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House of Representatives
House Judiciary Standing Committee
Anderson House Office Building
124 North Capitol Avenue
P.O. Box 30014
Lansing, MI 48909-751455555

RE: Testimony In Opposition to HB 4354 (2013)

Dear House Judiciary Committee Representative:

We are here to urge you in the strongest possible terms to vote NO on HB4354.

House Bill 4354 proposes to immunize certain doctors in a wide swath of health care encounter settings from accountability for negligence and misconduct that injures and kills patients. It would do so by establishing unprecedented legal burdens for recovery resulting from improper care delivered in an emergency department, obstetrical unit, surgical operating room, cardiac catheterization laboratory or radiology department immediately following the evaluation or treatment of a patient in an emergency department. The bill would amend the Revised Judicature Act[1], to require a patient needlessly injured in these settings to meet an improvable and unprecedented legal standard – gross negligence proven by clear and convincing evidence – in order to prevail. In the final analysis the bill would make medical care more dangerous for Michigan citizens and shift the costs for injured patients onto Michigan taxpayers.

Preventable Medical Injuries: A real, known danger to Michigan and our nation.

Over 40,000 patients suffer preventable harm in the health care system each day.[2] Medical errors are the fifth leading cause of death in the United States and result in annual costs of up to $29 billion[3]. A recent study published in the New England Journal of Medicine demonstrated that over 18% of patients are injured by health care errors[4]. This study followed the seminal Institute of Medicine study that found medical errors cause up to 98,000 deaths and more than 1 million injuries in the United States each year[5]. In the face of these well documented dangers, HB4354 would essentially grant doctors and hospitals immunity from liability in a host of common treatment situations encountered in a hospital setting.

The First Impact of HB4354: Immunity by Imposing an Improvable Legal Standard.

It is well known that Medical malpractice claims are among the hardest to pursue in our civil justice system and have the lowest rates of recovery for patients[6]. Doctors, hospitals, and other healthcare providers already enjoy incredible legal protections in Michigan. These include caps and limits on damages[7], shortened statute of limitations[8], claim accrual provisions[9], costly

expert witnesses[10] and procedural requirements. In conjunction, these existing protections already make many meritorious cases economically non-viable to pursue. On top of this, injured patients must overcome both the "white code of silence" among doctors unwilling to testify against their colleagues[11] and public misperceptions about frivolous law suits[12].

Nevertheless, HB4354 would raise the burden on injured patients higher yet, to an impossible standard: requiring *clear and convincing evidence* that the health care provider's misconduct reached a level of *gross negligence* in order for the patient to prevail. These standards have never been applied in a general negligence setting, let alone the already complex field of medical malpractice. They would essentially amount to an outright bar to recovery.

Under Michigan law, "clear and convincing" evidence is the highest evidentiary burden in our civil justice system. It is the same burden imposed on the State when seeking to terminate parental rights. Our courts have defined clear and convincing evidence as evidence that, "produces in the mind of a trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; evidence so clear, direct and weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."[13]

"Gross negligence" is not just really bad negligence, as many would assume; it deals with the subjective intent of the actor and is one step shy of an intentional tort standard constituting, "conduct that is so reckless that it demonstrates a substantial lack of concern for whether an injury will result."[14] Put another way, gross negligence is "quasi-criminal and manifests an intentional disregard to another's safety."[15] Combining both, in the context of a medical malpractice claim, will create a legal burden virtually impossible to overcome.

HB4354 would do away with "the Standard of Care"

HB4354 undermines the entire legal foundation of jurisprudence regulating the liability of professionals – the failure to act in accordance with the standard of care of a profession. The failure to comply with standard of care does not constitute gross negligence.[16] Under the standard proposed by HB4354, even a surgeon who removes the wrong body part, or who administers lethal drugs to the wrong patient, so called "never events"[17], could be granted immunity from liability. HB4354 would eviscerate traditional concepts of the standard of care and burden of proof in medical malpractice cases.

Under HB4354, this insurmountable burden would be imposed on patients injured in a multitude of settings, not just the emergency department. While HB4354 is couched in terms of emergency department care, in actuality it casts a far broader net, covering improper care in an "emergency department or obstetrical unit located in and operated by a hospital, or in a surgical operating room, cardiac catheterization laboratory, or radiology department immediately following the evaluation or treatment of the patient in an emergency department."

Moreover, under HB4354, the jury would be instructed to consider a host of potentially irrelevant information designed to confuse and distract from the physician's negligence, such as whether their was a pre-existing relationship with the patient, whether the physician had been informed of the patients allergies, medications, *entire* health history, and circumstances that lead to admission.

The fact that an injury occurred during a medical emergency is already taken into account under our current system of jurisprudence. The standard of care is defined to include "in the same or similar circumstances" as testified to by a doctor's peers. If any of the factors set forth in the proposed statute (e.g. whether there was a pre-existing patient relationship, whether the doctor was informed of the patients entire health history, etc) they are already considered in the context of the "the same or similar" circumstances. This has been the norm for a century.[18] Juries are already further instructed that, "[t]here are risks inherent in medical treatment that are not within a doctor's control. A doctor is not liable merely because of an adverse result."[19] There is simply no need to grant any more unfair advantages to doctors or make an already complex field of law more confusing.

Non-existent, Baseless Justifications

The proponents of HB4354 contend the legislation is necessary to contend with a *potential future* shortage of doctors. Connecting this alleged justification with the objective data and established facts readily demonstrates their rationale is mere fiction. There simply is no shortage of doctors in Michigan compared to other states. In fact, Michigan ranks 8th in the country in total physicians, 7th in Ob/Gyn's and 5th in emergency physicians. 15th in the nation in physicians per capita according to the American Medical Association.[20] And while some doctors continue to complain about the number of medical malpractice lawsuits, the evidence shows the opposite is true. An extensive study of medical malpractice insurance conducted by the State of Michigan[21] concluded that, "claims frequency continues to decline." This is confirmed by the Michigan State Court Administrative Office (SCAO) which indicates that medical malpractice filings have been cut in half in the last ten years and are stable. The 2010, 2011 and 2012 SCAO Annual Reports indicate that less than 800 medical negligence cases were filed each year *statewide*.[22]

Michigan's experience tracks what has been demonstrated repeatedly on a national level: both the number of malpractice payments made on behalf of physicians and cumulative amount paid for malpractice claims are at historic lows. According to most recent information available from the National Practitioner Data Bank (NPDB), created by the federal government to track medical malpractice demographics, 2012 represented the ninth consecutive year that the number of malpractice payments for physicians fell from historic averages, plummeting to the lowest level since the NPDB was created in 1990. As of 2012 the cumulative *value* of malpractice payments was likewise the lowest level in NPDB history as well.[23] Indeed, the sum total of medical malpractice payments made on behalf of doctors represented .11 percent (a small fraction of 1%) of total U.S. health care costs.[24]

The assertion that HB 4354 is needed to "fix" a high liability environment caused by medical malpractice cases or that a fear of lawsuits is discouraging physicians from providing care to patients in Michigan, based on the objective data; is without factual foundation. In reality, these incendiary accusations – made time and time again – are a ruse. Recent studies in renowned medical journals have reached the same conclusion.[25]

The Second Impact of HB4354: Fiscally unsound and irresponsible legislation.

The immunity created by HB4354 would in turn shift the burden of injuries caused by negligent doctors from the insurers who receive premiums to insure against those risks to employers, local governments and ultimately Michigan tax payers. If dangerous doctors and negligent hospitals are not held accountable -- the rest of us end up paying for their wrongdoing.

When doctors are held accountable, medical bills paid by employer sponsored health insurance, Medicare, Medicaid, and local governments gets paid back out of the proceeds before the injured person receives a single penny.

Take for example, Michigan's Medicaid statutory reimbursement scheme codified at MCL § 400.106(5). In addition to having a right to recovery payments *already made* on behalf of an injured party, Medicaid can seek security of future expenditures as a condition of eligibility for future benefits. If a recovery is made on account of medical malpractice, the Medicaid patient will either have to have the proceeds placed in a court supervised special needs trust, such as a Medicaid Pay Back Trust or Medicaid Pooled Trust, under 42 USC §1396p(d)(4)(A) or (d)(4)(C) or lose eligibility for Medicaid benefits. Under such a trust, trust distributions are made only for qualified purposes and Medicaid is reimbursed for their expenditures from residual trust assets at the death of the disabled individual.

Medicare has a similar right to reimbursement under 42 U.S.C. § *1395y*(b)(2)(A). According to Medicare (CMS), in FY 2010, Medicare's reimbursement program (MSPRC) returned $413 million to the Medicare Trust Funds nationwide. According to Medicare's reports to the Senate Oversight Committee, "MSPRC has been very successful in safeguarding taxpayer resources and improving the fiscal integrity of the Medicare program."[26]

Similarly, many health insurers are actually self funded ERISA (private sector) or local government plans – meaning the money is paid by the employer or the local government, and the insurance company acts as a third party administrator. They have similar rights to recovery for care that has been paid for as a result of medical negligence.

HB 4354 would take away that recovery and consequently shift the financial burden of catastrophic care to employers and health insurance companies, resulting in increased rates for all citizens. It would drain employee benefit accounts and ultimately place huge economic stress on employers- some may be driven out of business. It would raise health care premiums. In addition to the State of Michigan and private business, this fiscally unsound Bill would burden local governments, some of whom are already in financial distress and cutting services to our Citizens. Again, enacting this Bill would lead to loss of that reimbursement from wrongdoers and imposed by taxation on Michigan's citizens.

If Doctors get a free pass, then employers and tax payers will be taxed with that burden.

Everyone in this room appreciates that as elected legislators you have a tremendous responsibility – enacting law and policy to protect the citizens of this great state. Everyone agrees that Michigan citizen's are harmed by medical negligence.

Yet MCEP, whose real interests are obvious, asks you to give doctors, hospitals and their insurance companies legal immunity for wrongdoing – a free pass – never mind the costs imposed upon the citizens, employers, local government and the families of the injured.

We suggest the correct way to address the problem is to promote safer medicine by holding wrongdoers accountable and responsible for the harm they cause. We hope each of you have the wisdom to see the truth, and the courage to do the right thing, to protect Michigan's citizens.

Respectfully Submitted:

Stephen Goethel

Chad Engelhardt

[1] MCL 600.101, *et. seq.*
[2] Institute for Healthcare Improvement. 5 Million Lives Campaign, http://www/ihi.org/offerings/Initiatives/PastStrategicInitiatives/5MillionLivesCampaign/Pages/default.aspx
[3] Journal of the American Medical Association, *2001; 286(9):1078.doi:10.1001/jama.286.9.1078*
[4] Temporal Trends in Rates of Patient Harm Resulting from Medical Care, N Engl J Med 2010; 363:2124-2134
[5] To Err is Human: Building a Safer Health System, National Academic Press, Washington D.C. (1999)
[6] See, e.g., Department of Justice, Bureau of Justice Statistics, Tort Trials and Verdicts in Large Counties, 1996 (Published Aug. 2000)
[7] MCL 600.1483, MCL 600.5805(5), 600.5851(7)
[8] MCL 600.5838a
[9] MCL 600.2912d, 600.2169
[10] MCL 600.2912b
[11] And Justice for Whom? Winfield J. Wells, M.D., J Thorac Cardiovasc Surg 1999;117:211-219
[12] Five Myths of Medical Malpractice, Chest Journal of the American College of Chest Physicians, January 2013, Vol 143, No.; 1 Medical Malpractice Litigation and Tort Reform, Vanderbilt Law Review, Vol. 59, No. 4, Hyman, David A.; Silver, Charles.
[13] *Kefgen v. Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000), see also M Civ Jl 8.01(b).
[14] MCL 691.1407(7)(a)M Civ Jl 14.10, Jennings v Southwood, 446 Mich 125; 521 NW2d 230 (1994)
[15] *Papjesk v Chesapeake & O R Co*, 14 Mich App 550, 556; 166 NW2d 46 (1968)
[16] *Xu v Gay*, Mich App 263, 668 NW2d (2003)
[17] 42 CFR §411, 412, 413, 489, 73 Fed. Reg. at 48473 – 48487; see also the CMS list of hospital-acquired-conditions at http://www.cms.hhs.gov/HospitalAcqCond/06_Hospital-Acquired_Conditions.asp#TopOfPage
[18] M Civ Jl 30.01 (Standard of Care)
[19] M Civ Jl 30.04
[20] http://www.statehealthfacts.org/comparemaptable.jsp?ind-433&cat8
[21] Office of Financial and Insurance Regulation, Evaluation of the Michigan Medical Professional Liability Insurance Market, (October, 2009)
[22] http://courts.mi.gov/education/stats/Caseload/Pages/default.aspx
[23] No Correlation – Continued Decrease in Medical Malpractice Payments Debunks Theory that Litigation is to Blame for Soaring Medical Costs, Public Citizen, August 2013.
[24] No Correlation – Continued Decrease in Medical Malpractice Payments Debunks Theory that Litigation is to Blame for Soaring Medical Costs, Public Citizen, August 2013, citing NPDB, A.M. Best & Co and Centers for Medicare and Medicaid Studies.
[25] http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/062211/Taylor.pdf